

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of)
RAINBOW BROADCASTING COMPANY)
For an extension of time)
to construct)
and)
For an Assignment of its)
construction permit for)
Station WRBW(TV), Orlando, Florida)

GC Docket No. 95-172
File No. BMPCT-910625KP
File No. BMPCT-910125KE
File No. BTCCT-911129KT

TO: The Honorable Joseph Chachkin
Administrative Law Judge

RECEIVED

SEP 26 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

DOCKET FILE COPY ORIGINAL

PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW
OF PRESS BROADCASTING COMPANY, INC.

Harry F. Cole

Bechtel & Cole, Chartered
1901 L Street, N.W.
Suite 250
Washington, D.C. 20036
(202) 833-4190

Counsel for Press Broadcasting
Company, Inc.

September 25, 1996

024

TABLE OF CONTENTS

Summary	iii
Appearances	1
Preliminary Statement	1
<u>PROPOSED FINDINGS OF FACT</u>	4
I. Background	4
II. Issue Concerning Misrepresentation/Lack of Candor Surrounding RBC's Failure to Construct	15
A. The Prehearing Status Conference in the Miami Tower Litigation	16
B. The Alleged Inability and/or Unwillingness of Gannett to Cooperate in Construction	22
C. The Actual Reason for RBC's Failure to Construct Its Station	28
III. Issue Concerning Misrepresentation/Lack of Candor Relative to RBC's Financial Qualifications	31
A. The Existence of the Conant Commitment	33
(i) The Date of the Conant Commitment	35
(ii) The Terms of the Conant Commitment	37
(iii) The Basis for the Conant Commitment	39
(iv) Summary Concerning Existence of the Conant Loan Commitment	43
B. The Actual Availability of Any Loan Commitment From Mr. Conant, November, 1990 - June, 1991	45
IV. Section 73.3598(a)/Section 73.3534(b) Issue	52

Table of Contents
(continued)

V.	<u>Ex Parte</u> Issue	57
A.	The Sandifer Letter	58
B.	The Gordon Telephone Calls	60
C.	The Bush Calls	64
D.	The July 1, 1993 Meeting	71
E.	Summary Concerning the <u>Ex Parte</u> Issue	75
VI.	Findings Concerning the Credibility of Witnesses	77
	<u>PROPOSED CONCLUSIONS OF LAW</u>	82
I.	Introduction	82
II.	The Misrepresentation/Lack of Candor Issues	82
A.	Issue Concerning Misrepresentation/Lack of Candor Surrounding RBC's Failure to Construct	84
B.	Issue Concerning Misrepresentation/Lack of Candor Surrounding RBC's Financial Qualifications	88
III.	The Section 73.3598(a)/73.3534(b) Issue	90
IV.	The <u>Ex Parte</u> Issue	95
V.	Ultimate Conclusion	100

SUMMARY

The evidence developed in this case overwhelmingly demonstrates that RBC committed misrepresentation (or, at a minimum, lack of candor) in its January, 1991 and June, 1991 extension applications with respect both to (a) the reasons for RBC's failure to construct its station and (b) RBC's financial qualifications. See infra, Paragraphs 31-102.

With respect to the failure to construct misrepresentation issue, the evidence demonstrates that, contrary to RBC's representations in its January, 1991 and June, 1991 extension applications, RBC's failure to construct its station was not the result of any dispute with Gannett; rather, it was a purely voluntary decision by RBC based on RBC's concerns about the prospect of competition in the Orlando television marketplace.

With respect to the financial misrepresentation issue, RBC proffered only the testimony of Mr. Rey and Mr. Conant, as well as a written statement by Mr. Conant. RBC attempted to prove that, at all times relevant to this case, RBC had available to it an oral commitment, from Mr. Conant, to provide financing for construction and initial operation. However, the evidence in fact raises serious questions as to the actual existence of any such commitment. And even if such a commitment were found to have existed at some time, the evidence unquestionably establishes both that financing from Mr. Conant was not available to RBC during the period November, 1990-June, 1991 and that RBC was aware of (indeed, it was responsible for) that non-

availability.

The evidence also clearly demonstrates, as noted above, that RBC's failure to construct from August, 1990 - August, 1991 was attributable to RBC's own voluntary election, an election motivated solely by a desire to avoid an unfavorable competitive environment. But it is well-established that the avoidance of competition is not a valid justification for failure to construct. Since the avoidance of competition is the only reason that RBC voluntarily declined to proceed with construction, it is clear that RBC has failed to satisfy the requirements of Section 73.3534. Moreover, no evidence in the record supports any waiver of the two-year term provision of Section 73.3598.

The record evidence establishes beyond question that RBC, through its counsel, Ms. Polivy, and its dominant principal, Mr. Rey, knowingly violated the Commission's ex parte rules in an effort to influence the disposition of the RBC applications and to gain a result favorable to RBC. The ex parte violations included not only direct communications between RBC and the Commission's staff, but also the enlistment of Ms. Bush, an influential Senate staffperson, to bring pressure on the staff on RBC's behalf. Such insidious, inimical sub rosa interference is precisely the type of noxious misconduct which is prohibited by the ex parte rules.

RBC has engaged in repeated, serious misconduct of the worst sort. It has made repeated misrepresentations to the Commission, and it has flagrantly violated the Commission's ex parte rules.

Each of these separate violations, independently of the others, warrants the disqualification of RBC. And even if the ex parte violation were deemed, arguendo, not to be absolutely disqualifying in and of itself, the misconduct at issue there is sufficiently serious to warrant, at a minimum, denial of RBC's applications even if RBC were not to be found disqualified under the ex parte issue.

Moreover, even if RBC were somehow deemed to be qualified, the fact is that RBC has failed to satisfy the prerequisites for grant of its applications. In particular, RBC has failed to establish that an extension of its permit pursuant to Section 73.3534 is justified. To the contrary, the evidence establishes conclusively that no such extension is warranted at all under clear Commission precedent.

As a result, it is concluded that RBC is not qualified to remain a permittee, and that even if it were, its extension applications could not be granted. Accordingly, those applications must be denied, RBC's permit must be cancelled, its call sign deleted, its assignment application dismissed as moot, and operation of Station WRBW(TV) terminated.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of)
RAINBOW BROADCASTING COMPANY) GC Docket No. 95-172
For an extension of time) File No. BMPCT-910625KP
to construct) File No. BMPCT-910125KE
and) File No. BTCCT-911129KT
For an Assignment of its)
construction permit for)
Station WRBW(TV), Orlando, Florida)
TO: The Honorable Joseph Chachkin
Administrative Law Judge

PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW
OF PRESS BROADCASTING COMPANY, INC.

Appearances

Bruce A. Eisen and Allen G. Moskowitz (Kaye, Scholer, Fierman, Hays & Handler LLP) (substituting for Renouf & Polivy), on behalf of Rainbow Broadcasting Company; Margot Polivy and Katrina Renouf (Renouf & Polivy), on behalf of Rainbow Broadcasting, Ltd.; Harry F. Cole and Ann C. Farhat (Bechtel & Cole, Chartered), on behalf of Press Broadcasting Company, Inc.; David Silberman and Stewart A. Block, on behalf of the Separate Trial Staff

Preliminary Statement

1. This case was designated for hearing by the Commission in a Memorandum Opinion and Hearing Designation Order ("HDO"), 11 FCC Rcd 1167 (1995). The issues specified for hearing in the HDO are as follows:

- (a) To determine whether Rainbow [Broadcasting Company ("RBC")] intentionally violated Sections 1.1208 and 1.1210 of the Commission's ex parte rules by soliciting a third party to call the Commission on [RBC]'s behalf, and by meeting with Commission staff to discuss the

merits of [RBC]'s application proceedings.

- (b) To determine whether [RBC] made misrepresentations of fact or was lacking in candor with respect to its financial qualifications regarding its ability to construct and initially operate its station, in violation of Sections 1.17 and 73.1015 of the Commission's rules or otherwise. ^{1/}
- (c) To determine whether [RBC] made misrepresentations of fact or was lacking in candor regarding the nature of the tower litigation in terms of its failure to construct in connection with its fifth and sixth extension applications, in violation of Section 73.3534(b) of the Commission's rules or otherwise. ^{1/}
- (d) To determine whether [RBC] has demonstrated that under the circumstances either grant of a waiver of Section 73.3598(a) or grant of an extension under Section 73.3534(b) is justified.
- (e) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether [RBC] is qualified to be a Commission licensee and whether grant of the subject applications serves the public interest, convenience and necessity.

2. In the HDO, Press Broadcasting Company, Inc. ("Press"), licensee of Station WKCF(TV), Clermont, Florida, was made a party to the proceeding. HDO, ¶10. In addition, the HDO provided for the designation of a Separate Trial Staff ("STS") to represent the Commission, in light of the fact that the Mass Media Bureau ("MMB") had been recused from this proceeding. Id. The burden of proceeding with the introduction of evidence on all designated issues, and the burden of proof with respect to all issues, were placed on RBC. HDO, ¶11.

^{1/} Pursuant to an Erratum, DA 96-156, Mimeo No. 61019, originally released December 15, 1995, subsequently re-released in corrected form on February 12, 1996, the text of this issue was corrected to read as set forth above.

3. The captioned applications include two applications, filed by RBC, for extension of its construction permit for Station WRBW(TV), Orlando, Florida, and a third application, filed by RBC and Rainbow Broadcasting, Limited ("RBL"), for consent to the assignment of that construction permit from RBC to RBL. Initially, no notice of appearance was filed on behalf of RBC, although a notice of appearance was filed on behalf of RBL. When the lack of any appearance for RBC was noted by counsel for Press during the first prehearing conference herein (at Tr. 7), the Presiding Judge (over objections from counsel for RBL ^{2/}) indicated that an appearance on behalf of RBC should be entered. Tr. 14-24. Eventually, counsel for RBL also filed a notice of appearance on behalf of RBC. Shortly thereafter, however, a notice of substitution of counsel on behalf of RBC was submitted. ^{3/}

4. Prehearing conferences were held on January 30, 1996, March 7, 1996, April 11, 1996 and May 16, 1996, all in

^{2/} According to counsel for RBL, RBL is the "business successor" to RBC, with "the same principals, the same voting". Tr. 8. Also according to counsel for RBL, RBC "does not exist" (Tr. 9, 10, 13) and the resolution of the issues herein would be "binding upon" RBL (Tr. 14).

^{3/} In Footnote 1 to a Memorandum Opinion and Order, FCC 95M-29, Mimeo No. 60864, released March 7, 1996, the Presiding Judge noted that RBL -- which had (a) filed a notice of appearance, (b) appeared at the first prehearing conference, and (c) participated with the other parties in discovery and scheduling meetings -- had technically not been named a party to the proceeding in the HDO, had not sought leave to intervene, and was therefore not a party. Thereafter, RBL did submit a petition for leave to intervene which was granted. See Order, FCC 96M-46, Mimeo No. 60960, released March 21, 1996.

Washington, D.C. Hearing sessions were held on June 25, 26, 27 and 28 and July 11, 1996, also in Washington, D.C. The record was closed on July 11, 1996. Tr. 1065. Proposed findings of fact and conclusions of law were scheduled to be submitted on September 19, 1996, and replies were scheduled to be submitted on October 10, 1996; those dates were later extended to September 26 and October 17, respectively, at the request of the STS by Order, FCC 96M-212, Mimeo No. 62126, released September 12, 1996.

PROPOSED FINDINGS OF FACT

I. Background

5. The designated issues all relate generally to a common factual history, many prominent aspects of which are undisputed. The following is a review of that common factual history, a review which is intended to serve as a backdrop against which the particular points in dispute under each of the separate issues may be analyzed and assessed. Proposed findings set forth in this Background section are intended to be considered with respect to all issues.

6. RBC first obtained its permit to construct and operate a new television station on Channel 65 in Orlando, Florida in 1984. Jt. Exh. 1, ¶2 ^{4/}; Metro Broadcasting, Inc., 99 FCC 2d 688 (Rev. Bd. 1984). The permit itself was issued in 1986, with

^{4/} "Jt. Exh." refers to the Joint Hearing Exhibits submitted by all parties hereto. "Rainbow Exh." refers to hearing exhibits submitted jointly by RBC and RBL. "STS Exh." refers to hearing exhibits submitted by the STS. "Press Exh." refers to hearing exhibits submitted by Press.

an expiration date of April 22, 1988. Jt. Exh. 1, ¶4.

Throughout the period 1988-1990, RBC filed applications for extension or reinstatement of its permit, each time citing the pendency of the appeals process -- administrative and judicial appeals of the grant of the permit were not finally resolved until August 30, 1990, Jt. Exh. 1, ¶10 -- and the resulting non-finality of the grant of the permit. Jt. Exh. 1, ¶8;

Tr. 811. ^{5/} Each of those applications for extension or reinstatement was granted, and as of August, 1990 -- when the appellate process concluded and the grant of RBC's application was final -- the expiration date of the permit was January 31, 1991.

7. RBC did not construct its station between August 30, 1990 and January 31, 1991. E.g., Tr. 860-63.

8. What RBC did do during that time was to initiate a lawsuit ("the Miami Tower Litigation"), in early November, 1990, against, inter alia Guy Gannett Publishing Co. ("Gannett"), the owner of the tower specified in RBC's construction permit.

Jt. Exh. 1, ¶12. While the particular motivation for the filing of that lawsuit will be discussed in greater detail below at, e.g., Paragraphs 55-59, the suit unquestionably had its genesis in a rule making proceeding initiated by Press in 1988. See Amendment of Section 73.606(b), Table of Allotments, Television

^{5/} In each of its applications for extension, RBC sought to have its permit extended for two years following finality of the grant of the permit. In response to each such request, the Commission granted RBC six-month extensions. See Tr. 813.

Broadcast Stations (Clermont and Cocoa, Florida), 4 FCC Rcd 2515 ("Swap Notice of Proposed Rule Making") (Allocations Branch, 1989).

9. In that rule making proceeding, Press proposed to "swap" Channel 68 (the channel originally utilized by Press' Station WKCF(TV)) in Clermont for Channel 18 in Cocoa pursuant to Section 1.420(h) of the Commission's rules and the Commission's Policy on Intraband Television Channel Exchanges, 59 R.R.2d 1455 (1986), recon. denied, 3 FCC Rcd 2517 (1988). The proposed channel "swap" included, as an integral component, the relocation of Station WKCF(TV)'s transmitter to the Gannett tower specified in RBC's construction permit, at the same approximate height (i.e., approximately 1500 feet) as RBC's antenna. See, e.g., Amendment of Section 73.606(b), Table of Allotments, Television Broadcast Stations (Clermont and Cocoa, Florida) ("Swap Report and Order"), 4 FCC Rcd 8320, 8321, ¶7 (Allocations Branch 1989). ^{5/}

10. RBC unsuccessfully opposed Press' proposal before the MMB, which approved the "swap" proposal in November 1989. RBC unsuccessfully sought review of that decision before both the full Commission, Amendment of Section 73.606(b), Table of Allotments, Television Broadcast Stations (Clermont and Cocoa, Florida), 5 FCC Rcd 6566 (1990), and the Court of Appeals,

^{5/} Press provided to the Bureau, in 1989, a letter from a Gannett official confirming the availability of that tower facility for Press' operation. See Swap Report and Order at ¶¶ 19, 19.

Rainbow Broadcasting Company v. FCC, 949 F.2d 405 (D.C. Cir. 1991). In October-November, 1990, while RBC's various efforts to derail the "swap" were pending, the MMB proceeded to process Press' application for a construction permit to implement the "swap". ^{2/}

11. In early November, 1990, with Press' application to relocate to the Gannett tower moving along the processing line, RBC initiated the Miami Tower Litigation against Gannett. Jt. Exh. 1, ¶12. In that lawsuit, RBC sought injunctive relief preventing Gannett from leasing space at the 1500-foot level on the tower to Press. Press Ex. 9.

12. To obtain the injunctive relief that it was seeking, RBC had to demonstrate that it would be irreparably harmed absent such relief. To demonstrate such irreparable injury, RBC advised the Court that, if Press were allowed to install its antenna at the 1500-foot level of the Gannett tower:

[RBC] will be unable to secure financing to build and operate the station. . . .

[RBC]'s ability to compete in the Orlando television

^{2/} Press' application (File No. BPCT-900413KI) sought, inter alia, the relocation of the Station WKCF(TV) antenna to the Gannett tower at the same approximate height (i.e., approximately 1500 feet) as specified in RBC's permit. It had been filed in April, 1990. In early October, 1990, the Commission issued a public notice reflecting the acceptance of Press' application for filing. See Broadcast Applications, Report No. 14838, Mimeo No. 10078, released October 5, 1990 (official notice requested, copy included as Attachment A hereto). A subsequent public notice, released on November 27, 1990, reflected that Press' construction permit application was granted on October 31, 1990. See Broadcast Actions, Report No. 20996, Mimeo No. 10731, released November 27, 1990 (official notice requested, copy included as Attachment B hereto).

market will be obstructed to the point that it will not be able to secure the financing to build a television station for Channel 65 or any other tower in the area. . . .

No financing will be available to build and operate [RBC's] station, given that it is not economically viable, and the station will never be built.

Press Exh. 9, pp. 12-14.

13. In January, 1991 -- two months after the filing of the complaint in the Miami Tower Litigation containing the representations quoted immediately above, and less than a month before the expiration of its construction permit -- RBC filed with the Commission an application for extension of that permit. ^{8/} In that application RBC stated that

Actual construction has been delayed by a dispute with the tower owner which is the subject of legal action in the United States District Court for the Southern District of Florida (Case No. 90-2554 CIV MARCUS).

Jt. Exh. 2, p. 3. RBC also stated that it was "ready, willing and able to proceed with construction", and reaffirmed the continuing accuracy of all representations made in its original construction permit application. Jt. Exh. 2, pp. 1, 3.

14. In February, 1991, Press submitted to the Commission pleadings arguing that, in light of statements made by RBC in the Miami Tower Litigation, RBC's claims to the Commission in its January, 1991 extension application were misrepresentative or, at least, lacking in candor. E.g., Press Exh. 13, pp. 30-31. Press also argued (relying on material taken from RBC's suit against

^{8/} That application (File No. BMPCT-910125KE) is one of the applications in the caption of this proceeding. A copy of that application appears in the record as Jt. Exh. 2.

Gannett) that RBC's statements in the Miami Tower Litigation demonstrated that RBC was not financially qualified to construct. Id. at pp. 21-23.

15. The January, 1991 RBC extension application was granted prior to the submission of Press' arguments ^{2/}, with August 5, 1991 specified as the new expiration date. Jt. Exh. 1, ¶14. RBC did not construct its station between January 31, 1991 and August 5, 1991.

16. On June 6, 1991, Judge Stanley Marcus, presiding over the Miami Tower Litigation, denied RBC's request for injunctive relief. Jt. Exh. 1, ¶16; Rey v. Guy Gannett Publishing Co., 766 F. Supp. 1142 (S.D. Fla. 1991).

17. On June 25, 1991, RBC filed an application seeking a further extension of its construction permit. ^{10/} In that application RBC repeated its earlier assertion that "[a]ctual construction has been delayed by a dispute with the tower owner". Jt. Exh. 3, p. 3. RBC also stated, unequivocally and unconditionally, that it "will commence operation prior to

^{2/} The January, 1991 extension application was granted on February 5, 1991, the same day that public notice of the acceptance of that application for filing was released. Jt. Exh. 1, ¶14; Tr. 485. As a result, Press could not as a practical matter have submitted its arguments prior to the grant of the application. Press initially submitted its arguments in a pleading entitled "Informal Objection"; upon learning that the RBC application had already been granted, Press re-submitted its arguments in a pleading entitled "Petition for Reconsideration". Press Exh. 13.

^{10/} That application (File No. BMPCT-910625KP) is another of the applications in the caption hereof. A copy of that application is included in the record as Jt. Exh. 3.

December 31, 1992, as it previously informed the Commission."

Id.

18. In July, 1991, Press filed an objection to RBC's June, 1991 extension application. Jt. Exh. 1, ¶18. Press' various arguments, first presented in its February, 1991 pleadings, remained unresolved at this time.

19. In October, 1991, Douglas A. Sandifer, writing on behalf of the Commission's Office of Managing Director ("OMD"), sent a letter to an individual (George G. Daniels) who had written to the Commission inquiring about the status of RBC's station. In his letter, Mr. Sandifer stated that

The ex parte rules require service on all parties of filings addressing the merits or outcome of restricted proceedings. Because there was a Petition for Reconsideration filed in February, 1991, (supplemented June, 1991) and an Objection filed in July 1991, of the grant of the application of [RBC] for extension of construction permit in this matter, the proceeding is considered "restricted" until such time as a final Commission decision is made and no longer subject to reconsideration or review by the Commission or the courts. See 47 CFR Section 1.1208.

Jt. Exh. 4, p. 1. A copy of Mr. Sandifer's October 8, 1991 was contemporaneously sent to, and received by, RBC's then-counsel, Margot Polivy. Id. at p. 2; Tr. 382.

20. On November 27, 1991, RBC filed a Supplement to its then-pending extension application. Jt. Exh. 1, ¶20. In that Supplement (which was executed on November 25, 1991), RBC stated that it was then "actively engaged" in at least one aspect of the construction process, and that it

anticipated that equipment contracts will be let in early 1992 and that the station will be operational by

December 1992.

Jt. Exh. 5, p. 2. In a one-paragraph cover pleading, counsel for RBC asserted that RBC's statement reflected that RBC was

proceeding with construction and anticipates completion and the commencement of operation in accordance with the schedule previously set forth to the Commission.

Id., p. 1.

21. On November 29, 1991, RBC filed the third application in the caption hereof, in which RBC proposed to assign its permit to RBL.^{11/} In that application, RBC again reflected its intent to commence operation of its station by December, 1992. Press Exh. 18, p. 3.

22. RBC did not construct its station between August 5, 1991 and December 31, 1992. E.g., Jt. Exh. 7.

23. In March, 1993, Clay Pendarvis, Chief of the MMB's Television Branch, wrote to RBC. Jt. Exh. 6. Mr. Pendarvis noted RBC's previously-stated expectation that construction would be completed by December, 1992. Id. Mr. Pendarvis then observed that it did not appear that construction had been completed, and advised RBC that "we cannot conclude that grant of the [June, 1991] extension application would serve the public interest." Id. Mr. Pendarvis then specifically requested a detailed explanation of what specific actions RBC had taken towards construction since November 27, 1991 (the date of RBC's Supplement to its June, 1991 extension application, Jt. Exh. 5,

^{11/} A copy of the RBC/RBL assignment application (File No. BTCCT-911129KT) is included in the record hereof as Press Exh. 18.

see Paragraph 20, supra). Id.

24. On April 12, 1993, RBC responded to Mr. Pendarvis' request. Jt. Exh. 1, ¶23. In its response, RBC effectively acknowledged that no construction had been completed since November 27, 1991. Jt. Exh. 7. According to a Statement of Joseph Rey included as part of that response, "[a]s a practical matter, [RBC] has been in limbo since November 1991." Id. at p. 5.

25. By letter dated June 18, 1993, Barbara A. Kreisman, Chief, Video Services Division ("VSD") denied RBC's June, 1991 extension application, dismissed its November, 1991 assignment application, cancelled RBC's construction permit, and deleted its call sign. Jt. Exh. 8. According to Ms. Kreisman, the Commission's

sole concern is whether circumstances beyond the permittee's control prevented construction (or substantial progress) during the most recent extension period [i.e., February 5, 1991 - August 5, 1991]. Based on the information before us, we find that the permittee's lack of progress is not due to circumstances beyond its control. . . .

. . . [T]he record reflects that the permittee clearly chose not to begin construction, and that the dispute with Gannett was not over whether [RBC] could construct but rather over whether it could prevent a competitor from utilizing its site. . . . [T]he dispute with Gannett was not a circumstance beyond [RBC's] control that impeded construction.

Id. at p. 3.

26. Ms. Polivy learned of Ms. Kreisman's letter on or about June 24, 1993. Tr. 385-86. Within days, Ms. Polivy asked Antoinette Cook Bush to call the Commission. E.g., Tr. 444;

Press Exhs. 2 and 4. In June, 1993, Ms. Bush was senior counsel to the Senate Telecommunications Subcommittee, although at the time of the call from Ms. Polivy she was at home, in New York, on maternity leave. Tr. 553-54; 572; 576-77. Ms. Bush spoke with Mr. Stewart and, separately, with Mr. Pendarvis. E.g., Tr. 559-62. Additionally, Ms. Polivy sought a meeting with Mr. Pendarvis and/or Roy Stewart, Chief of the MMB. Tr. 387. In that effort Ms. Polivy spoke with both Messrs. Stewart and Pendarvis. Id.

27. Following those conversations, a meeting was convened in Mr. Stewart's office on July 1, 1993. In attendance were Messrs. Stewart and Pendarvis, Ms. Kreisman, Paul Gordon (an attorney in the MMB's Television Branch), Robert Ratcliffe (Assistant Chief for Law of the MMB), Ms. Polivy, and RBC President and dominant principal, Joseph Rey. E.g., Jt. Exh. 1, ¶26. That meeting has been determined to have violated the Commission's ex parte rules. Jt. Exh. 10, p. 5, ¶22 ("[RBC] violated the Commission's ex parte rules"). ^{12/}

28. On July 2, 1993 -- the day following the meeting in Mr. Stewart's office -- RBC filed a petition for reconsideration with respect to the denial of its June, 1991 extension application. Rainbow Exh. 8. On July 30, 1993, Mr. Stewart issued a letter granting RBC's petition for reconsideration, reversing Ms. Kreisman's June 18, 1993 decision, and reinstating and granting RBC's extension and assignment applications.

^{12/} The Commission's conclusion concerning RBC's violation of the ex parte rules was not appealed and is, therefore, final and not subject to further consideration.

Jt. Exh. 9. By Memorandum Opinion and Order released May 23, 1994, the Commission denied Press' application for review of Mr. Stewart's decision and affirmed the reinstatement and grant of RBC's applications. Jt. Exh. 10.

29. On appeal by Press, the U.S. Court of Appeals for the District of Columbia Circuit granted Press' appeal and remanded the case to the Commission for further proceedings. Press Broadcasting Company, Inc. v. FCC, 59 F.3d 1365 (D.C. Cir. 1995). The Court of Appeals concluded that, contrary to the determinations of Mr. Stewart (in his July 30, 1993 letter) and the Commission (in its May 23, 1994 affirmance of Mr. Stewart's letter), at least three questions required further consideration. According to the Court of Appeals, substantial and material questions of fact existed with respect to RBC's representations about its failure to construct and its financial qualifications. Also, the Court concurred with the Commission's earlier conclusion that RBC had violated the ex parte rules; the Court disagreed, however, with the Commission's determination that that violation was the result of some misunderstanding by RBC concerning the applicability of the ex parte rules.

30. On remand from the Court, the Commission adopted the HDO initiating the instant proceeding.

II. Issue Concerning Misrepresentation/Lack of Candor Surrounding RBC's Failure to Construct ^{13/}

31. In its January, 1991 and June, 1991 extension applications, RBC advised the Commission that "[a]ctual construction has been delayed by a dispute with the tower owner which is the subject of legal action in the United States District Court for the Southern District of Florida." Jt. Exh. 2, p. 3, and Jt. Exh. 3, p. 3. In neither of its two extension applications did RBC provide any evidence of any kind to support this assertion. Id.

32. Both of RBC's extensions applications were executed by Mr. Rey, RBC's President and dominant principal. Id. Mr. Rey was the sole witness offered by RBC with respect to the Failure To Construct Misrepresentation/Lack of Candor Issue. As discussed below, Mr. Rey repeatedly testified that the delay referred to in the applications was the result of an order issued by Judge Marcus during a prehearing status conference in the Miami Tower Litigation; in the alternative, he suggested that RBC was not able to construct from November, 1990-June, 1991 because Gannett, the tower owner, either could not or would not cooperate with RBC in that effort. However, Mr. Rey's testimony was not credible, and is contradicted in virtually all material respects by documentary evidence and, in some instances, even by Mr. Rey's

^{13/} The issues will be addressed below in an order different from their listing in the HDO. The order of presentation of the issues herein is intended to permit a more logical, chronological discussion of the factual evidence, and also to permit more efficient cross-referencing of evidence which relates to more than one designated issue.

own testimony. The evidence demonstrates that RBC's failure to construct its station was not the result of any dispute with Gannett; rather, it was a purely voluntary decision by RBC based on RBC's concerns about the prospect of competition in the Orlando television marketplace.

A. The Prehearing Status Conference in the Miami Tower Litigation

33. During direct examination, Mr. Rey was asked whether anything had "happen[ed] after August 30, 1990, that prevented [RBC] from moving forward on construction." Tr. 731. Mr. Rey answered as follows:

I should add that, if the question to anything precluded the construction [sic], the answer I guess more specifically, just rambling history, is that there was a prehearing conference with Judge Marcus in November. . . . And Judge Marcus on his own in that prehearing conference asked, to the best of my recollection, that the status quo be preserved.

Tr. 732. During cross-examination, Mr. Rey further elaborated:

Q: What was the source of th[e] delay [referred to in RBC's extension applications]? Could you explain that, please?

Rey: The only thing that comes to mind, Mr. Cole, is the fact that we could not build because of the Judge Marcus order. . . .

. . . [H]e did order the status quo, and that's the way I understood it, and I could not build on my own.

Tr. 803-804.

34. Similarly, when asked whether -- apart from that which occurred in the November, 1990 prehearing conference before Judge Marcus -- any action was taken in the Miami Tower Litigation which precluded RBC from constructing its station, Mr. Rey

answered "Nothing that I can think of." Tr. 830. Thus, Mr. Rey's testimony was that Judge Marcus' order, in the November, 1990 prehearing status conference, precluded RBC from constructing.

35. Mr. Rey was shown two written orders issued by Judge Marcus in the Miami Tower Litigation in which Judge Marcus ordered Gannett (and the other defendants) "to preserve said status quo and to not sign or consummate any agreement or lease with PRESS and/or CHANNEL 18" pending the conclusion of the hearing before Judge Marcus on the RBC's request for preliminary injunction. Rainbow Exh. 5; Press Exh. 14. The orders, by their own clear terms, simply restricted Gannett from entering into any agreement with Press pending the outcome of the preliminary injunction hearing; those orders were not addressed to RBC (or any other plaintiff in the Miami Tower Litigation), nor did either order, by its own terms, preclude Gannett from proceeding with construction related to RBC. Id.

36. It was called to Mr. Rey's attention that the written orders -- at least one of which was apparently drafted by RBC's own counsel in the Miami Tower Litigation, Press Exh. 16 at p. 12; Tr. 840 -- were addressed only to the defendants, Tr. 733, 805, and thus did not, on their face, preclude RBC from proceeding with construction. In response, Mr. Rey made clear that, when he testified about Judge Marcus' order concerning maintenance of the status quo, he was not referring to the written orders (Rainbow Exh. 5 and Press Exh. 14), but rather to

statements made at the prehearing status conference. Tr. 804-805. ^{14/}

37. When asked to describe the precise language used by Judge Marcus which led Mr. Rey to believe that the status quo had to be preserved with respect to RBC as well as Gannett and its fellow defendants, Mr. Rey responded:

Rey: Words that come to mind is "no construction." No, I don't recall the exact, precise language, sir. I just walked away with the understanding that Judge Marcus wanted the status quo preserved.

Tr. 805. ^{15/}

38. Press Exh. 16 is the transcript of the November, 1990

^{14/} Mr. Rey testified in relevant part as follows:

Q: [W]hen you referred to Judge Marcus' order, you were not referring to that [Rainbow Exh. 5], are you . . . ?

Rey: I am referring to when I was present in front of Judge Marcus in that November . . . 1990 prehearing conference. . . . And I as the principal was present. And I recall the judge bringing up the subject on his own, and I understood that he wanted to preserve the status quo. . . .

Tr. 805. When asked whether he was testifying that the written order (Rainbow Exh. 5) did not accurately reflect Judge Marcus' instructions at the November, 1990 prehearing conference, Mr. Rey stated:

From my point of view from that November meeting, or prehearing conference, . . . I walked away that this gentleman, the judge, wanted the status quo to be preserved until he determined this thing. That's what I walked away with.

Tr. 805-806.

^{15/} See also Tr. 831 ("What I recall from the prehearing conference. . . is that the judge brought up the subject of the preservation of the status quo. The word 'construction' comes to mind, that he didn't want any.")

prehearing status conference, the only status conference conducted in the Miami Tower Litigation. ^{16/} That conference was held on November 27, 1990. During cross-examination Mr. Rey was shown the transcript of that conference and asked to point out any portion or portions which convinced him that RBC had been prohibited by Judge Marcus from proceeding with construction. Tr. 839-840. Mr. Rey acknowledged that there is no such language in the transcript. Tr. 840.

39. The day after he acknowledged (in cross-examination) that there was no such language in the transcript, Mr. Rey was asked during redirect examination whether, upon further review of the transcript, he had been able to find any references to the term "construction". Tr. 976. (As noted above, during cross-examination, Mr. Rey had testified that the term that "came to mind" as having been used by Judge Marcus during the prehearing status conference was "construction", Tr. 805, 831.) In response, Mr. Rey pointed to page 10 of the transcript, where the word "construction" appears. Tr. 976. However, in answer to questions from the Presiding Judge, he conceded that that single reference was made not by Judge Marcus, but rather by RBC's own counsel; moreover, Mr. Rey conceded that the reference related only to construction by or on behalf of Press, as opposed to RBC. Tr. 976-977.

40. At no time did RBC complain to Judge Marcus that RBC

^{16/} The parties stipulated that only one prehearing status conference was conducted in the Miami Tower Litigation. Tr. 835.